SUPREME COURT, U. S.

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MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-233 and 74-234

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MARYLAND, COMMONWEALTH OF VIRGINIA,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

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JOINT BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AND TRANS WORLD AIRLINES, INC. IN OPPOSITION

QUESTION PRESENTED

Whether the Civil Aeronautics Board exceeded its statutory authority or acted arbitrarily or unreasonably in prescribing equal per mile rates for North Atlantic gateway cities.

STATEMENT OF THE CASE

The proceeding which culminated in the Orders of the Civil Aeronautics Board (CAB), affirmed below, was initiated by complaints alleging that the North Atlantic cargo rate structure violated Section 404(b) of the Federal Aviation Act of 1958 (49 U.S.C. § 1374(b)). The rates, as established by agreements of the International Air Transport Association (IATA) and approved by the CAB, were alleged to unduly prefer New York and Boston, and unduly prejudice Baltimore and Washington, D.C.

The CAB instituted an investigation in response to the complaints[1] and an evidentiary hearing was held before CAB Administrative Law Judge William F. Cusick. The Judge found that the rates at issue were unlawful in that New York was unduly preferred and the interior gateways were unduly prejudiced. Judge Cusick recommended that the CAB approve the IATA agreement subject to the condition that Boston, Philadelphia, Baltimore, and Washington be common rated with New York and that rates to other interior gateways be equal per mile to those rates in effect at New York. (Joint App. 14a).

The CAB exercised its right of discretionary review of the Judge's decision. The CAB agreed with the Judge that the North Atlantic rate structure was unlawful. (Order 73-2-24, Joint App. 86a). It found, however, that the lawful rate structure was one where the rates between the interior gateways and Europe are equal per mile to the New York-Europe rates. Common rating was rejected as an unreasonable rate structure because it

[1] Subsequently the CAB expanded the case to include the issue of undue preference and prejudice vis-a-vis New York at Philadelphia, Cleveland, Detroit, and Chicago as well as at Boston, Baltimore, and Washington. For convenience and to distinguish between these seven cities and New York, the former are hereinafter referred to as "interior gateways."

was not related to cost, was contrary to CAB precedent, and resulted in unduly preferential and prejudicial rates. Upon the request of several of the interior gateway cities the Board reconsidered its decision. In Order 73-7-9 (Joint App. 121a) the Board affirmed its earlier Opinion and Order.

Pursuant to Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486, Petitioners sought review of the CAB's Orders in the court below. Petitioners argued that the undue preference and prejudice found by the CAB could only be corrected by common rating Boston, Baltimore, and Washington with New York. The court rejected the Petitioners' contention and affirmed the CAB's Orders.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT THE CAB DID NOT EXCEED ITS STATUTORY AUTHORITY OR ACT ARBITRARILY IN REQUIRING, AS A CONDITION OF APPROVAL OF IATA RATE AGREEMENTS, THAT THE CARRIERS USE COST RELATED EQUAL PER MILE RATES

A. Cost Related Equal Per Mile Rates Are Not Unduly or Unreasonably Preferential or Prejudicial or Unjustly Discriminatory

Section 404(b) of the Federal Aviation Act prohibits *undue* or *unreasonable* preference, *unjust* discrimination, or *undue* or *unreasonable* prejudice to any person, port, locality, or description of traffic. Equal per mile rates do not violate this standard.

The mileage related North Atlantic rate structure prescribed by the CAB is related to cost of service. This is the most reasonable and just method of pricing any service. In this manner each consumer pays his fair share of this cost of service.

Cost of providing air transportation services is directly related to mileage flown. This was demonstrated in the record before the CAB and the court below so found (Joint App. 8a). Petitioners do not challenge this finding here. Costs do not warrant the lower per mile rates for more distant points which Petitioners in effect seek. Indeed, in longhaul air transportation such as on the North Atlantic costs per mile tend to increase with distance. A recent CAB decision prescribing the fare structure for domestic passenger transportation found that, although the cost per mile decreases between 100 and 2,500 miles, the cost per mile actually *increases* for trips over 2,500 miles.[2] If anything the CAB's mileage based rate structure already prefers Petitioners. It certainly does not *unjustly* discriminate against or unduly prejudice Petitioners.

One of Petitioners' arguments-in-chief before the Administrative Law Judge was that the rate structure found to be unlawful was discriminatory because Baltimore and Washington shippers had an incentive to truck North Atlantic shipments to/from New York. Nowhere here or below was this argument asserted. It is not asserted because the incentive no longer exists. Any undue prejudice-in-fact has been eliminated.

B. Petitioners' Comparison of Rates Between Disparate Cities Fails to Demonstrate that the CAB Acted Arbitrarily or Capriciously

Petitioners place heavy reliance on the argument that different rates per mile between disparate city-pairs (*e.g.*, New York-Rome vs. Washington/Baltimore-Munich) creates an unlawful preference. The court below correctly held that such a difference in rates does not

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[2] *Domestic Passenger-Fare Investigation, Phase 9—Fare Structure*, Order 74-3-82, March 18, 1974, at App. 4. The shortest distance across the North Atlantic, Boston-Shannon, is 3,048 miles.

create undue preference or prejudice as between U.S. cities.

To compare disparate city-pairs, as stated by the court below, is "to compare apples with oranges." That rate differential is irrelevant. The Washington/Baltimore shipper competing with a New York firm for a Munich market compares Washington/Baltimore-Munich rates with New York-Munich rates. If the market is Rome, he would then compare Washington/Baltimore-Rome with New York-Rome. In both comparisons the rates are equal per mile. As correctly reasoned by the court below, traffic will not be diverted from Washington/Baltimore to New York because of rate differentials between disparate pairs of cities. No preference or prejudice results from these immaterial differentials. Any undue preference or prejudice was eliminated by the prescription of equal rates per mile for like city-pairs (*e.g.*, New York-Rome vs. Washington/Baltimore-Rome).

II. THE COURT BELOW CORRECTLY HELD THAT THE CAB WAS NOT REQUIRED AS A MATTER OF LAW TO PRESCRIBE COMMON RATES, AND DID NOT ABUSE ITS DISCRETION OR ACT ARBITRARILY IN REFUSING TO REQUIRE COMMON RATES FOR U.S. GATEWAYS

A. Absent Special Circumstances the CAB Has Consistently Refused to Permit Common Rates and Properly Refused to Impose Common Rates Here

For the past twenty-five years, the CAB has steadfastly refused to impose common rates. CAB policy "does not favor such rates on the ground that charging the same rate for a longer distance as for a shorter one is unsound and not justified under the Act." (Joint App. 106a). The CAB has required common rates in two iso-

lated cases, and then only for two very specialized markets.[3] In certain limited cases carrier-established common rates have been permitted. Such rates are condoned only where special circumstances can be shown to exist.[4]

Petitioners assert that Baltimore and Washington have been deprived of their geographic advantages vis-a-vis New York by common rating in markets other than the North Atlantic. This is erroneous as a matter of fact. Even though there is little direct service between Washington and South and Central American destinations, in many instances rates at the more distant City of New York are higher than at Washington.[5] The U.S. coast-to-coast long-haul air freight rate structure is not common rated. In every instance New York shippers pay higher rates for cargo shipments to the West Coast than shippers at less distant Baltimore and Washington.

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[3] Because of circumstances peculiar to intra-Hawaiian air transportation the CAB conditioned certification of Mainland-Hilo passenger service on the establishment of common fares. *Hilo-Mainland Temporary Service Investigation*, 47 C.A.B. 749 (1967). A prime purpose of that common fare arrangement was the protection of local Hawaiian carriers. In the *Pacific Service Rate Case*, 24 C.A.B. 629 (1957), *modified and aff'd sub nom. Pan American World Airways, Inc.* v. *CAB*, 256 F.2d 711 (D.C. Cir.), *cert. denied*, 358 U.S. 836 (1958), the CAB established common rates for mail destined to Tokyo from Seattle and San Francisco for the protection of transpacific air carriers. In neither case was undue preference or prejudice argued or considered.

[4] *See Hawaiian Common Fares Case*, 10 C.A.B. 921 (1949) and 37 C.A.B. 269 (1962), where the CAB initially prohibited even carrier-initiated common rates. Subsequently, while refusing to impose common rates, the CAB permitted carriers to file tariffs containing common rates because "special circumstances" had been demonstrated. Petitioners cite *Theodore Mfg. Corp.*, Order No. E-22710, September 30, 1965, as supporting the imposition of common rates. The rate there was carrier-established, and not Board imposed.

[5] Pan American's certificate prevents it from providing nonstop service between Baltimore and points in South and Central America.

The court below properly found that the CAB's decision establishing an equal per mile North Atlantic rate structure is consistent with the CAB's historical opposition to common rates. That policy has not been altered and is based on the principle that equal charges for service over different distances is unsound. In the limited instances where common rating does exist it has been permitted because of special circumstances.

B. The Decision of the Court Below Does Not Conflict With This Court's Standards for Review of Agency Determination of and Remedies for Unjust Discrimination

The CAB acted well within the limits of its authority as delineated by this Court, and the lower court properly held that the CAB did not abuse its discretion. A great deal of discretion is entrusted to an administrative agency when it prescribes a remedy for undue preference and prejudice. Such decisions will not ordinarily

> be disturbed by the court except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Board of Trade of Kansas* v. *United States*, 314 U.S. 534, 546 (1942); *see also Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949); *New York* v. *United States*, 331 U.S. 284, 347 (1947).

Petitioners do not allege that the CAB has transgressed any of the above guidelines. Instead it is maintained by Petitioners that, because the ICC has approved common rating, the CAB is compelled to require it in the instant case. Not only is Petitioners' claim erroneous, but a CAB decision based on such grounds would be arbitrary, capricious, and an unreasonable exercise of discretion.

The court below properly found that the CAB lawfully exercised its discretion in eliminating undue preference and prejudice, notwithstanding any asserted theory of rail rate regulation. Congress recognized the fundamental difference between economic regulation of rail and air transportation when it rejected ICC jurisdiction over aviation and created a separate independent agency. *See* C. Rhyne, *The Civil Aeronautics Act Annotated*, xvi, 43-44 n.129, and *C & S Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 107 (1948).

Theories of rail regulation simply do not apply to air transportation rate regulation. The court below, the CAB, and economists recognize differences in rail and air transportation costs. Because of these differences, the ICC, in regulating rates, places far less emphasis on distance than does the CAB. As stated by the court below: "Unit costs of railroad operations do not tend to increase with distance nearly as much as in air carrier operations." (Joint App. 8a). This proper factual finding supports the CAB's rejection of common rates in this case. The CAB, after analysis of the cost structure of the air transportation industry, imposed a set of rate and cost policies reflecting considerations peculiar to air transportation, resulting in a reasonable North Atlantic rate structure free of discrimination or preference.

C. Decisions of the ICC Do Not Conflict With the Holding of the Court Below

Petitioners erroneously assert that ICC decisions require the rejection of distance as a judgment factor in cases of undue preference and prejudice. ICC precedent does not support that assertion. The Interstate Commerce Act has not been interpreted to *require* common rating to eliminate unjust discrimination or as *requiring* the ICC to deprive a locality of its geographic advantages. The decisions interpreting the Interstate Commerce Act

have held that the ICC could in fact require departure from the system of common rates which it has at times "tolerated." *New York Central R.R. Co.* v. *United States*, 207 F. Supp. 483, 492 (S.D.N.Y. 1962).

Petitioners seek to argue that the cases relied upon by the court below did not deal with "ports" and are therefore not dispositive. Nothing in the legislative history of the Interstate Commerce Act and its amendments, nor anything in court decisions, requires the ICC to treat ports any differently than other localities in deciding discrimination issues.[6] The ICC has frequently held distance to be the deciding factor in finding, and requiring elimination of undue preference and prejudice. See *New York* v. *United States*, 331 U.S. 284 (1947), where this Court upheld ICC action requiring the elimination of different rates for the same distance.[7]

ICC precedent does not require the elimination of natural geographic advantages. This Court has held that the Interstate Commerce Act "does not attempt to equalize

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[6] *Boston and Maine R.R.* v. *United States*, 202 F. Supp. 830 (D. Mass. 1962), *aff'd by an equally divided court*, 373 U.S. 372 (1963). This Court has not specifically ruled on the issue sought to be raised by Petitioners. However, in interpreting a 1940 amendment, similar to the 1935 amendment to the Interstate Commerce Act which added "ports" to the anti-discrimination provision, this Court held that the addition to Section 3(1) of the Interstate Commerce Act (49 U.S.C. § 3(1)) of the words "region, district, territory," "did not introduce a new standard of discrimination in section 3(1)." *New York* v. *United States*, 331 U.S. at 300.

[7] See also *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 830-831 (1973), where the ICC stated: "Distance, other things being equal, is the best measure of the transportation service actually performed . . ." *Id.* at 833; *Grain Groups I & J Origins to Pacific Coast*, 299 I.C.C. 129, 134 (1956); ". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations", *Paper from the South and Southwest*, 218 I.C.C. 202, 216 (1936); *Apples and Pears from Oregon and Washington*, 181 I.C.C. 579, 591 (1932).

fortune, opportunities, or abilities." *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911). The court below properly held that the anti-discrimination provisions of the Interstate Commerce Act and the Federal Aviation Act were not designed to eliminate natural advantages of geographic location. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216 (1951); *United States* v. *Illinois Central Ry.*, 263 U.S. 515, 524 (1924).

D. Common Rating of Baltimore and Washington With New York Would Result in Unjust Discrimination Against and Undue Prejudice to Other Gateway Cities

Petitioners argued below that the proper remedy would be to common rate Baltimore and Washington with New York. This conflicts with the CAB's determination to require equality of treatment for *all* the gateway cities at issue. Common rating of Baltimore and Washington with New York would result in unjust discrimination against the other cities receiving direct service in the North Atlantic market.

Petitioners failed to recognize the effect of common rating only some of the cities. Cleveland, for example, would be unduly prejudiced. As noted by the court below, the Cleveland-London mileage is only 3.2 percent greater than the Baltimore-London mileage. If common rating were adopted for Baltimore/New York, the Cleveland rate per mile would be 12.3 percent greater than the Baltimore rate.

Petitioners now state that all the cities should be common rated. The logical—and absurd—extension of this philosophy would be to common rate the entire United States by excluding distance and cost as significant rate-making factors. This is not an acceptable substitute for the CAB disposition.

What Petitioners have suggested, by calling for the common rating of "competing ports," is that a new unlawful discrimination should be created in favor of their cities. Petitioners would unduly prefer the Washington/Baltimore shipper by permitting that person to pay the same rate as the Boston shipper, although cargo from Washington/Baltimore must travel over 380 miles *farther*. The CAB merely applied the reasonable distance and cost factors to insure a rate structure which does not unduly prefer or prejudice *any* gateway city.

Common rating of Baltimore and Washington with New York would result in those cities receiving more transportation for less money. Discrimination in fact and law is produced when equal charges are levied for unequal service. *New York Central R.R. Co.* v. *United States*, 207 F. Supp. at 490.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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